

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

The Kroger Co.,	:	Case No.: C-1-02 439
	:	
Plaintiff,	:	Judge Beckwith
	:	
v.	:	MOTION TO RELEASE
	:	FUNDS DEPOSITED WITH THE
Malease Foods Corp., formerly	:	<u>REGISTRY OF THE COURT</u>
known as Malese Foods Corp.,	:	
	:	
Defendant.	:	

Pursuant to the Federal Rules of Civil Procedure and Local Rule 77.2, Defendant Malease Foods Corp. respectfully submits its motion to release funds deposited with the Registry of the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the day of December, 2003, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

The Kroger Co.,	:	Case No.: C-1-02 439
	:	
Plaintiff,	:	Judge Beckwith
	:	
v.	:	MEMORANDUM IN SUPPORT OF
MOTION TO RELEASE	:	
	:	FUNDS DEPOSITED WITH THE
Malease Foods Corp., formerly	:	<u>REGISTRY OF THE COURT</u>
known as Malease Foods Corp.,	:	
	:	
Defendant.	:	

Pursuant to the three Lease Agreements between Malease and Kroger, Kroger was obligated to pay rent for the period April 1, 2003 through September 30, 2003 in the sum of \$50,000.00. Rather than make the rent payment due on September 30, 2003, Kroger served the annexed motion (Exhibit "A") to deposit funds into the Registry of the Court.

This motion was served by ordinary mail on September 30, 2003 and did not arrive in the office of Malease's counsel until Friday, October 3, 2003. Two days later and on Monday October 6, 2003 this Court (Beckwith, J.) entered a Notation Order granting Kroger's motion without Malease having had an opportunity to respond. As

we now show, there was no basis for Kroger's request, and Malease moves this Court to vacate the Order and direct that the accrued rent due it be paid forthwith.

In its motion, Kroger admits as it must that the rent in the sum of \$50,000.00 for the period April 1st through September 30, 2003 was due and payable on September 30th. Kroger's justification for its refusal to pay the rent is owed is a naked contention that Kroger may prevail at the trial of this action. Of course, Malease disputes Kroger's position.

Malease respectfully submits that until such time as the respective positions of both Malease and Kroger are adjudicated on the merits, neither side should enjoy any unfair advantage. Thus, Malease continues to be bound by all obligations imposed upon it as landlord, and conversely Kroger as tenant remains liable for the rent due. Kroger is not entitled to be relieved of this obligation to pay rent any more than Malease is entitled to be relieved of its obligations as landlord with respect to the leased property.

As matters now stand, Kroger has procured a *de facto* attachment of the rent owed to Malease without the slightest showing of any entitlement to such relief. Malease respectfully submits that had it been given a fair opportunity to respond, and had this Court been fully apprised of all relevant facts at the time it entered its October 6th Notation Order, Kroger's motion would not have been granted for the simple reason

that until a contrary determination, the three Leases remain in full force and effect and the rights and liabilities of Kroger as tenant and Malease as landlord continue to be governed thereby.

Accordingly, Malease respectfully requests that the prior Order of this Court be vacated and that the Clerk be directed to forthwith release the rent due Malease in the sum of \$50,000.00 as of September 30, 2003 to Malease.

Respectfully submitted,

/s/ R. Gary Winters

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